



## **DEPARTMENT OF LABOR**

### **Employee Benefits Security Administration**

#### **29 CFR Part 2509**

#### **RIN 1210-AC15**

### **Interpretive Bulletin Relating to the Independence of Employee Benefit Plan Accountants**

**AGENCY:** Employee Benefits Security Administration, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** This document contains an Interpretive Bulletin (IB) setting forth guidelines for determining when a qualified public accountant is independent for purposes of auditing and rendering an opinion on the financial statements required to be included in the annual report filed with the Department of Labor (Department) under the Employee Retirement Income Security Act of 1974, as amended (ERISA). Under ERISA, a plan administrator is generally required to retain, on behalf of all plan participants, an “independent qualified public accountant” to conduct an annual examination of the plan’s financial statements and to render an opinion as to whether the financial statements are presented fairly in conformity with generally accepted accounting principles (GAAP) and whether the schedules required to be included in the plan’s annual report present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The purpose of this document is to revise and restate an IB the Department issued in 1975 on accountant independence in order to remove certain outdated and unnecessarily restrictive provisions and reorganize its provisions for

clarity while continuing to ensure that the Department's interpretations foster proper auditor independence and access of employee benefit plan to highly qualified auditors and audit firms.

**DATES:** Effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Suzanne Adelman, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), (202) 693-8500. This is not a toll-free number.

*Customer Service Information:* Individuals interested in obtaining information from the Department of Labor concerning ERISA and employee benefit plans may call the EBSA Toll-Free Hotline, at 1-866-444-EBSA (3272) or visit the Department of Labor's website ([www.dol.gov/ebsa](http://www.dol.gov/ebsa)).

## **SUPPLEMENTARY INFORMATION:**

### **BACKGROUND**

The Employee Retirement Income Security Act of 1974, as amended (ERISA), contains provisions designed to protect the interests of plan participants and beneficiaries by requiring the establishment of effective mechanisms to detect and deter abusive practices. This includes requiring annual reporting of financial information and activities of employee benefit plans to the Department of Labor (Department). Sections 101, 103 and 104 of ERISA impose annual reporting and filing obligations on pension and welfare benefit plans. Plan administrators, employers, and others generally satisfy these annual reporting obligations pursuant to the Department's implementing regulations by filing a Form 5500 (Annual Return/Report of Employee Benefit Plan) together with any required schedules and attachments. An integral component of ERISA's annual reporting provisions is the requirement that employee benefit plans, unless otherwise exempt, be subjected to an annual audit performed by an independent

qualified public accountant (IQPA), and that the accountant's report be included as part of the plan's Form 5500 annual report filed with the Department.<sup>1</sup> The IQPA requirements in ERISA were intended to protect the assets and the financial integrity of employee benefit plans, and provide participants, beneficiaries, plan administrators, other plan fiduciaries, and the Department with reliable information about an employee benefit plan and its financial soundness.

Section 103(a)(3)(A) of ERISA, codified at 29 U.S.C. 1023(a)(3)(A), sets forth the requirements governing the IQPA's annual audit. The administrator of an employee benefit plan is required to engage, on behalf of all plan participants, an IQPA to conduct an examination of the plan's financial statements, and other books and records of the plan, as the accountant deems necessary to form an opinion on whether the financial statements required to be included in the plan's annual report are presented fairly in accordance with generally accepted accounting principles (GAAP) applied on a basis consistent with that of the preceding year and whether the schedules required to be included in the plan's annual report present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. Section 103(a)(3)(A) of ERISA further requires that the accountant's examination must be conducted "in accordance with generally accepted auditing standards [(GAAS)], and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant."<sup>2</sup> The accountant's report

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<sup>1</sup> Certain employee benefit plans are eligible for waivers or limited exemptions from the IQPA audit requirements under regulations issued by the Department. For example, 29 CFR 2520.104-44 provides a limited exemption for welfare plans which are either unfunded, insured or partly unfunded-partly insured, and 29 CFR 2520.104-46 provides a conditional waiver of the examination and report of an IQPA for employee benefit plans with fewer than 100 participants.

<sup>2</sup> Under ERISA, the Department plays no role in setting GAAP and GAAS standards. Such standards are set by institutions closely related to the accounting industry - the Financial Accounting Standards Board (FASB) and the

must contain certain opinions with respect to the financial statements and schedules covered by the report and the accounting principles and practices reflected in such report. Further, the accountant's report must identify any matters to which the accountant takes exception, whether the matters to which the accountant takes exception are the result of the Department's regulations and, to the extent practicable, the effect on the financial statements of the matters to which the accountant has taken exception. If the auditor's independence is considered to have been impaired after the audit is completed, a new audit by another accountant may be required.<sup>3</sup>

Section 103(a)(3)(D) of ERISA, codified at 29 U.S.C. 1023(a)(3)(D), states that the term "qualified public accountant" means—(i) a person who is a certified public accountant, certified by a regulatory authority of a State; (ii) a person who is a licensed public accountant, licensed by a regulatory authority of a State; or (iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by the Secretary for a person who practices in States where there is no certification or licensing procedure for accountants. Although section 103 of ERISA does not include a definition of the term "independent" for purposes of the audit requirement, in the Department's view, an accountant's independence is at least of equal importance to the professional competence an accountant brings to an engagement in rendering an opinion and issuing a report on the financial statements of an employee benefit plan and the schedules required to be included in the plan's annual report. Thus, pursuant to the

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American Institute of Certified Public Accountants (AICPA). The Public Company Accounting Oversight Board (PCAOB) is responsible for setting auditing standards for audits of public companies. In July 2019, the AICPA Auditing Standards Board (ASB) issued Statement on Auditing Standards (SAS) No. 136, Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA. Codified in new AU-C section 703 of the AICPA Professional Standards, the standard addresses the auditor's responsibility to form an opinion and report on the audit of financial statements of employee benefit plans subject to ERISA, and the form and content of the auditor's report issued as a result of an audit of ERISA plan financial statements. SAS No. 141 deferred the effective date of SAS No. 136 to audits of ERISA plan financial statements for periods ending on or after December 15, 2021, with early implementation permitted. Information on the Auditing Standards Board and AU-C Section 703 is available on the AICPA website at <https://us.aicpa.org>.

<sup>3</sup> If a plan does not comply with ERISA's annual reporting requirements, including failing to satisfy the requirements relating to an audit report and opinion of an IQPA, the Department may reject the plan's annual report. If a satisfactorily revised report is not submitted, the Department may, under section 104(a)(5) of ERISA, retain an independent qualified public accountant on behalf of the participants to perform a sufficient audit, bring a civil suit for legal or equitable relief that may be appropriate, or take any other enforcement action authorized under Title I.

Department's authority to interpret and enforce section 103(a)(3)(A) of ERISA, the Department issued Interpretive Bulletin 75-9 in 1975 to provide guidelines for determining when an accountant is independent for purposes of ERISA's annual reporting requirements.<sup>4</sup>

No explanatory preamble accompanied the 1975 IB when it was published,<sup>5</sup> but its structure and provisions were largely predicated on specific principles that generally parallel the Securities and Exchange Commission's (SEC) independence requirements for auditing publicly traded companies. Specifically, the auditor (1) cannot function in the role of management, (2) cannot audit his or her own work, (3) cannot serve in roles or have relationships that create mutual or conflicting financial interests, and (4) cannot be in a position of being an advocate for the audit client.<sup>6</sup> The 1975 IB reflected these principles by setting forth three specific sets of circumstances that would conclusively render the accountant to not be independent—the first is based on certain roles and statuses, the second is based on financial interests, and the third is based on engaging in management functions related to financial records that would be the subject of the audit—and by setting forth a general facts and circumstances approach that would govern in all other cases.

The Department has periodically been asked to clarify and update its guidelines on the independence of accountants to adjust to changes in the accounting industry and to address differences that have developed as other regulatory authorities have adopted changes to their auditor independence requirements. Accountants and accounting firms have pointed to the challenges of monitoring compliance with different independence standards that apply to different business sectors for which they provide audit services. They have also noted that the nature and complexity of the business environment in which accountants perform services has

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<sup>4</sup> Codified at 29 CFR 2509.75-9. See 40 FR 53998 (Nov. 20, 1975), as amended at 40 FR 59728 (Dec. 30, 1975), and redesignated as IB 75-9 at 41 FR 1906 (Jan. 13, 1976).

<sup>5</sup> *Id.*

<sup>6</sup> The SEC's requirements for auditor independence are described in the preamble to the final rule on the Revision of the Commission's Auditor Independence Requirements, 65 FR 76008 (Dec. 5, 2000).

changed in ways that have led many accounting firms to develop expertise in an array of activities in addition to audit services that may be provided to audit clients. For example, accountants may engage in business consulting, valuation and appraisal services, applications programming, electronic data processing, and recordkeeping.

In the years following the 1975 IB, other regulatory authorities have addressed and revisited issues relating to accountant independence. For example, on January 28, 2003, the SEC adopted final rules regarding independence for auditors that file financial statements with the SEC implementing Title II of the Sarbanes-Oxley Act of 2002.<sup>7</sup> The SEC further amended its auditor independence rules in 2019 and 2020.<sup>8</sup> The Sarbanes-Oxley Act also authorized the establishment of the Public Company Accounting Oversight Board (PCAOB), which requires that a registered public accounting firm and its associated persons be independent of the firm's audit client throughout the audit and professional engagement period.<sup>9</sup> The United States Government Accountability Office (GAO) has similarly published auditor independence requirements under Government Auditing Standards that cover federal entities and organizations receiving federal funds. *See* GAO, *The Yellow Book*, [www.gao.gov/yellowbook/overview](http://www.gao.gov/yellowbook/overview). The AICPA, although a private membership organization, sets GAAS requirements for non-PCAOB audits, which, ERISA 103(a)(3)(A) expressly adopted for plan audits, and GAAS includes standards by which the auditor must abide to avoid impairment of independence. *See* AICPA, [www.aicpa.org](http://www.aicpa.org). Many states have also included an independence component in their requirements for licensed public accountants. Some have specifically adopted the AICPA's Code of Professional Conduct, including its independence guidelines, while others have adopted state-specific rules.

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<sup>7</sup> 68 FR 6005 (Feb. 5, 2003), as corrected by 68 FR 15354 (Mar. 31, 2003).

<sup>8</sup> *See* Auditor Independence with Respect to Certain Loans or Debtor-Creditor Relationships, 84 FR 32040 (July 5, 2019); Qualifications of Accountants, Release No. 33-10876 (Oct. 16, 2020), [www.sec.gov/rules/final/2020/33-10876.pdf](http://www.sec.gov/rules/final/2020/33-10876.pdf). (published in the Federal Register at 85 FR 80508 (Dec. 11, 2020)).

<sup>9</sup> *See* <https://pcaobus.org/oversight/standards/ethics-independence-rules>.

In 2006, the Department issued a Request for Information (RFI) on Independence of Employee Benefit Plan Accountants which sought information from the public to assist the Department in evaluating whether the guidelines in the 1975 IB provided adequate guidance for plan officials, participants and beneficiaries, accountants, and other affected parties.<sup>10</sup> The Department solicited public input on a broad range of issues, including fifteen separate questions on particular areas. After reviewing the public comments submitted in response to the RFI, the Department did not undertake a rulemaking project on accountant independence or otherwise change the Department's interpretive stance on accountant independence generally. The Department also concluded that suggestions from some commenters that the Department simply adopt the SEC's current rules or guidelines on accountant independence or the ethics-based independence guidelines of the AICPA would have required a significant departure from the Department's largely facts and circumstances approach, to a more detailed and prescriptive approach to independence determinations.<sup>11</sup> The Department also concluded that it was not necessary to formally incorporate all or part of the AICPA independence guidelines into an updated IB. Compliance with the AICPA independence guidelines is already part of the GAAS audit requirement incorporated into statute by ERISA section 103(a)(3)(A) and also part of the Department's general relevant facts and circumstances approach to the accountant independence requirement. Further, the Department was concerned that expressly adopting either the AICPA or another regulator's requirements as the ERISA standard could result in unintended and undesirable outcomes to the extent that aspects of those other standards or future changes to those standards departed from ERISA policies and purposes.

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<sup>10</sup> 71 FR 53348 (Sept. 11, 2006)

<sup>11</sup> For example, the AICPA publishes "The Plain English Guide to Independence" that cites a wide range of "further assistance" documents, including the AICPA Code of Professional Conduct; Background and Basis for Conclusions: Revisions to Interpretations and Rulings Under Rule 101— Independence; a Conceptual Framework for Independence and a related Toolkit; and the 2011 Yellow Book Independence – Nonaudit Services Documentation Practice Aid. The Guide including links to the "further assistance" documents are available at <https://us.aicpa.org/interestareas/professionalethics/resources.html>.

Although not directly related to the accountant independence requirement, the Employee Benefit Security Administration (EBSA) Office of the Chief Accountant (OCA) actively engages in an ongoing assessment of the level and quality of audit work performed by IQPAs with respect to financial statement audits of employee benefit plans covered by ERISA.<sup>12</sup> This assessment began as a follow-up to a 1989 report issued by the Office of Inspector General (OIG) in which the OIG concluded that 23% of employee benefit plan audits failed to comply with one or more established professional standards. In addition, the OIG found that 65% of IQPA reports on employee benefit plans did not meet the reporting and disclosure requirements of ERISA and the regulations thereunder. The primary objective of EBSA's ongoing review has been to assess whether the level and quality of audit work performed by IQPAs with respect to audits of employee benefit plans covered by ERISA had improved as a result of actions taken by the Department and the accounting and auditing profession since the issuance of the OIG's 1989 report.

EBSA also implemented an Audit Quality Inspection Program in 2005 that significantly expanded OCA's inspection of IQPAs' work as compared to OCA's former on-site audit work paper reviews and "mini" inspections. The expanded program has two main components: (1) inspections of IQPAs' employee benefit plan audit practices and (2) reviews of a sample of the IQPAs' employee benefit plan audit work papers. EBSA has published two reports on the results of its assessments and recommendations for improvements, one in 2004 and another in 2015. Work on a third report is underway. One important report finding is that there is a clear link between the number of employee benefit plan audits performed by a certified public accountant (CPA) and the quality of the audit work performed. As set out in the May 2015 Report, the Department's analysis of the data from this audit quality survey indicated a wide disparity in

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<sup>12</sup> OCA enforces the annual reporting and audit requirements applicable to ERISA-covered employee benefit plans through the imposition of civil penalties against a plan administrator whose annual report is rejected, as provided in Part 1, Sections 103 and 104, and Part 5, Section 502, of Title I of ERISA. OCA also operates under the broad authority to conduct investigations and to inspect records, under Part 5, Section 504 of Title I of ERISA.



deficiency rates between those CPAs who perform the fewest plan audits and those firms that perform the largest number of plan audits. CPAs who performed the fewest number of employee benefit plan audits annually had a 76% deficiency rate for the audits, meaning that the audit contained deficiencies with respect to one or more relevant GAAS requirements. In contrast, accountants in firms performing the most plan audits had a deficiency rate of 12% for the audits.<sup>13</sup> As noted above, the Department did not open a rulemaking project after its 2006 RFI, but it has continued to engage with accounting industry stakeholders, including efforts to encourage plan fiduciaries to engage auditors who perform high-quality employee benefit plan audits.<sup>14</sup> That engagement more recently has focused on whether the Department can adjust the 1975 IB to remove outdated or unnecessarily restrictive provisions with the goal of fostering greater plan access to high-quality auditors for ERISA plans and better aligning the Department's independence guidelines with those of other accounting regulatory bodies. Based on that continuing engagement, the Department is persuaded that certain changes to the 1975 IB independence guidelines can be implemented that would be consistent with the goal of expanding employee benefit plan access to the most qualified accountants and accounting firms while ensuring that the guidelines continue to foster proper auditor independence. In addition to making the adjustments described in more detail below, the Department has reorganized the interpretive bulletin for clarity.

1. *Time period during which accountants are prohibited from holding financial interests in the plan or plan sponsor*

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<sup>13</sup> Report of the U.S. Department of Labor, Employee Benefits Security Administration, Office of the Chief Accountant, *Assessing the Quality of Employee Benefit Plan Audits* (May 2015) ([www.dol.gov/agencies/ebsa/key-topics/reporting-and-filing/audit-quality](http://www.dol.gov/agencies/ebsa/key-topics/reporting-and-filing/audit-quality)).

<sup>14</sup> In September 2018, the Department published a guidebook on selecting an auditor, reviewing the audit work and auditor's report, and maximizing the value of the audit process. The guidebook is entitled *Selecting an Auditor for Your Employee Benefit Plan*, and it is available at [www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/selecting-an-auditor-for-your-employee-benefit-plan.pdf](http://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/selecting-an-auditor-for-your-employee-benefit-plan.pdf). A copy can also be ordered by calling 1-866-444-3272. The publication is part of the Department's efforts to educate employee benefit plan fiduciaries that selecting an auditor is a fiduciary responsibility and that a well performed audit is a vital protection for the plan.

The 1975 IB set out the Department’s view that an accountant cannot conduct the ERISA-required audit of a plan’s financial statements if the accountant, the accountant’s firm, or a “member” of the firm has a “direct financial interest or material indirect financial interest” in the plan or plan sponsor “during the period covered by the financial statements” or “[d]uring the period of professional engagement.” For example, assume a calendar-year publicly traded sponsor of an employee benefit plan decides to change its accountant in March 2021 to perform the audit of the benefit plan’s calendar year 2020 Form 5500 financial statements, which must be filed with the Department for calendar year plans no later than the maximum extended due date of October 15, 2021. Under the 1975 IB, the new accountant would be ineligible to audit the benefit plan’s financial statements if even one partner of the firm held a single share of the publicly traded stock of the sponsor at any time during 2020, the year under audit. The AICPA, in the context of our ongoing engagement on independence issues and in a letter to EBSA dated March 15, 2019, advised that the requirement that the accountant not have such an interest “during the period covered by the financial statements” departs from the rules of other accounting regulatory bodies because it prevents auditors from avoiding disqualification by disposing of the financial interest prior to the period of the professional engagement (i.e., before signing the initial audit engagement letter or commencing audit procedures).<sup>15</sup>

The Department is persuaded that the absence of a divestiture provision for certain financial interests in the 1975 IB makes it unnecessarily restrictive and may serve to unduly limit ERISA plans’ access to the best qualified auditors. In the Department’s view, requiring that an accountant (or a member of the accountant’s firm) not have such a financial interest in the publicly traded securities of the plan sponsor during the period covered by the financial statements (in contrast to the period of the engagement) is not necessary to ensure an

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<sup>15</sup> AICPA Letter to Joe Canary, Director, Office of Regulations and Interpretations, Employee Benefits Security Administration, from James W. Brackens, Jr., CPA, CGMA, Vice President – Ethics & Practice Quality, dated March 15, 2019.

accountant's independence. By disposing of such publicly traded securities prior to the engagement, firms and accountants can readily eliminate concern about independence and give plans access to their audit services.

Therefore, subject to a limitation described below, the Department is revising its independence guidelines to provide an exception for new audit engagements from the otherwise applicable condition on holding disqualifying financial interests during the period covered by the financial statements being audited. Under this approach, an accountant or firm is not disqualified from accepting a new audit engagement merely because of holding publicly traded securities of a plan sponsor during the period covered by the financial statements as long as the accountant, accounting firm, partners, shareholder employees, and professional employees of the accountant's accounting firm, and their immediate family, have disposed of any holdings of such publicly traded securities prior to the period of professional engagement. The updated IB also includes a definition of the "period of professional engagement" that provides the term means the period beginning when an accountant either signs an initial engagement letter or other agreement to perform the audit or begins to perform any audit, review or attest procedures (including planning the audit of the plan's financial statements), whichever is earlier, and ending with the formal notification, either by the member or client, of the termination of the professional relationship or the issuance of the audit report for which the accountant was engaged, whichever is later. This exception provides accountants with a divestiture window between the time when there is an oral agreement or understanding that a new client has selected them to perform the plan audit and the time an initial engagement letter or other written agreement is signed or audit procedures commence, whichever is sooner.<sup>16</sup>

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<sup>16</sup> Compare with the SEC rule on "Qualifications of accountants" at 17 CFR 210.2-01, including paragraphs (c)(1)(iii)(B) (financial relationships exception for new audit engagements) and (f)(13) (defining "immediate family" as meaning a person's spouse, spousal equivalent, and dependents).

The new audit engagement exception is limited to publicly traded securities. For purposes of the exception, publicly traded securities are securities listed on a registered stock exchange in which quotations are published on a daily basis, securities regularly traded in a national or regional over-the-counter market for which published quotations are available, or securities traded on a foreign national securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority and where the security is deemed by the SEC as having a ready market under applicable SEC rules. The ERISA auditor independence rules often apply to private and closely held organizations that sponsor plans. In the Department's view, incentives for an auditor to apply less robust audit procedures or to be less transparent in reporting audit results could carry over from other financial interests in the sponsor held during the period covered by the financial statements being audited. Accordingly, in order to maintain the important protections and public confidence that auditor independence provides, the updated IB continues to provide that other financial interests in the plan sponsor during the period covered by the financial statements categorically impair the accountant's independence even if divested before commencing a new audit engagement.

Furthermore, the Department is of the view that it is appropriate that an accountant's relative's ownership interest in a plan sponsor be attributed to the accountant in appropriate circumstances in order to preserve the accountant's and the firm's independence.<sup>17</sup> Although not expressly incorporated into the other examples in the 1975 IB, the Department has and will continue generally to treat the attribution rules in the AICPA independence standard as a relevant fact and circumstance, and, accordingly, has and will continue to consider spouse and dependent ownership and roles in our enforcement of the ERISA section 103(a)(3)(A) requirements governing IQPA audits.

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<sup>17</sup> Attribution provisions are also part of the SEC and PCAOB independence requirements. See 17 CFR 210.2-01(c)(1)(i) (investments in audit clients) and ET Section 101.02, Interpretation 101-1B at <https://pcaobus.org/Standards/EI/Pages/ET101.aspx>.

The updated IB continues the current guideline under which an independent, qualified public accountant may permissibly engage in or have members of the accountant's accounting firm engage in certain professional services to the plan or plan sponsor that are not connected to an audit or review of a plan's financial statements without being deemed to have failed the independence requirement. Specifically, the updated IB continues the provisions in the current guidelines under which an accountant will not be treated as failing the independence requirement solely by reason of rendering actuarial services by an actuary associated with the accountant or the accountant's firm, or retention or engagement of the accountant or the accountant's firm on a professional basis by the plan sponsor, provided that the specific examples of prohibitions on recognition of independence in the updated IB are not violated. As with the 1975 IB, the updated IB provides as a general principle that in determining whether an accountant or accounting firm is not, in fact, independent with respect to a particular plan, the Department will give appropriate consideration to all relevant circumstances, including evidence bearing on all relationships between the accountant or accounting firm and that of the plan sponsor or any affiliate thereof. The IB also continues the caution from the 1975 IB that multiple services arrangements may involve prohibited transactions under ERISA, and notes the requirements to comply with conditions in prohibited transaction exemptions, such as the prohibited transaction exemption in ERISA section 408(b)(2) for ERISA section 406(a)(1)(C) service provider transactions.<sup>18</sup>

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<sup>18</sup> The 1975 IB includes the following sentences: "It should be noted that the rendering of services to a plan by an actuary and accountant employed by the same firm may constitute a prohibited transaction under section 406(a)(1)(C) of the Act. The rendering of such multiple services to a plan by a firm will be the subject of a later interpretive bulletin that will be issued by the Department of Labor." Section 406(a)(1)(C) sets forth a prohibited transaction restriction arising from the furnishing of goods, services, or facilities between a plan and a party in interest. Subsequent to the issuance of the 1975 IB, regulations and guidance on prohibited transactions in general (e.g., 29 CFR 2550.408b-2) were issued, rendering the reference to a "later interpretive bulletin" obsolete and unnecessary.

## *2. Definition of “Office” for Purpose of Determining Who is a “Member” of the Firm.*

The 1975 IB defines “member” as “all partners or shareholder employees in the firm and all professional employees participating in the audit or located in an office of the firm participating in a significant portion of the audit.” In the years since the 1975 IB was published, the concept of an “office” for workplace purposes has changed to focus more on workgroups than on physical locations. The Department is persuaded that its definition of “member” would be improved by including a definition of “office” for purposes of determining when an individual is “located in an office” of the firm participating in a significant portion of the audit. In the Department’s view, substance should govern the office classification, and the expected regular personnel interactions and assigned reporting channels of an individual may well be more important than an individual’s physical location. Accordingly, the updated IB defines the term “office” to mean a reasonably distinct subgroup within a firm, whether constituted by formal organization or informal practice, in which personnel who make up the subgroup generally serve the same group of clients or work on the same categories of matters regardless of the physical location of the individual. This definition of the term “office” is modeled on the definition used in the AICPA independence standard. See AICPA Code of Professional Conduct, 0.400.36 (Effective December 15, 2014, and updated for official releases through August 31, 2016) (available at [www.aicpa.org](http://www.aicpa.org)). See also SEC rules on independence of accountants at 17 CFR 210.2-01(f)(15) (definition of “office”).

### **List of Subjects in 29 CFR Part 2509**

Employee benefit plans, Employee Retirement Income Security Act, Fiduciaries, Pensions, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department is amending part 2509 of title 29 of the Code of Federal Regulations as follows:

## **Subchapter A—General**

### **PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974**

1. The authority citation for part 2509 continues to read as follows:

**Authority:** 29 U.S.C. 1135. Secretary of Labor’s Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75-10 and 2509.75-2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75-5 also issued under 29 U.S.C. 1002. Sec. 2509.95-1 also issued under sec. 625, Pub. L. 109-280, 120 Stat. 780.

#### **§ 2509.75–9 [Removed]**

2. Remove § 2509.75-9.
3. Add §2509.2022-01 to read as follows:

#### **§ 2509.2022-01 Interpretive bulletin relating to guidance on independence of accountant retained by employee benefit plan.**

This section provides guidance for determining when a qualified public accountant is independent for purposes of auditing and rendering an opinion on the financial information required to be included in the annual report (Form 5500 Annual Return/Report of Employee Benefit Plan) filed with the Department of Labor (Department).

(a) *In general.* Section 103(a)(3)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) and 29 CFR 2520.103-1(b)(5) of the Department’s implementing regulations require that the accountant retained by an employee benefit plan be “independent” for purposes of examining plan financial information and rendering an opinion on the financial statements and schedules required to be contained in the annual report. Under section 103(a)(3)(A) of ERISA

the Department will not recognize any person as an independent qualified public accountant who is in fact not independent with respect to the employee benefit plan upon which that accountant renders an opinion in the annual report filed with the Department. In determining whether an accountant or accounting firm is not independent, the Department will give appropriate consideration to all relevant circumstances, including evidence bearing on all relationships between the accountant or accounting firm and that of the plan sponsor or any affiliate thereof, and will not confine itself to the relationships existing in connection with the filing of annual reports with the Department of Labor.

(b) *Examples.* The following examples are intended to illustrate how the Department would apply paragraph (a) of this section in certain common financial and business relationships. The Department in enforcing the Form 5500 annual reporting requirements will not consider an accountant to be independent with respect to a plan if:

(1)(i) During the period of professional engagement to examine the financial statements being reported, at the date of the opinion, or during the period covered by the financial statements, the accountant, the accountant's firm or a member thereof had, or was committed to acquire, any direct financial interest or any material indirect financial interest in such plan, or the plan sponsor as that term is defined in section 3(16)(B) of ERISA;

(ii) An accountant will not be deemed to have failed the independence requirement under paragraph (b)(1)(i) of this section as a result of any holding of publicly traded securities of the plan sponsor during the period covered by the financial statements if:

(A) The accountant did not audit the client's financial statements for the immediately preceding fiscal year; and



(B) The accountant, the accounting firm, a partner, shareholder employee, or professional employee of the accounting firm, and their immediate family disposed of any holding of publicly traded securities of the plan sponsor before the earlier of:

(1) Signing an initial engagement letter or other agreement to provide audit, review, or attest services to the audit client; or

(2) Commencing any audit, review, or attest procedures (including planning the audit of the client's financial statements); and

(iii) For purposes of paragraph (b)(1)(ii) of this section, publicly traded securities are securities listed on a registered stock exchange in which quotations are published on a daily basis, securities regularly traded in a national or regional over-the-counter market for which published quotations are available, or securities traded on a foreign national securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority and where the security is deemed by the U.S. Securities and Exchange Commission (SEC) as having a ready market under applicable SEC rules;

(2) During the period of professional engagement to examine the financial statements being reported, at the date of the opinion, or during the period covered by the financial statements, the accountant, the accountant's firm, or a member thereof was connected as a promoter, underwriter, investment advisor, voting trustee, director, officer, or employee of the plan or plan sponsor, except that a firm will not be deemed not independent in regard to a particular plan if a former officer or employee of such plan or plan sponsor is employed by the firm and such individual has completely disassociated himself from the plan or plan sponsor and does not participate in auditing financial statements of the plan covering any period of his or her employment by the plan or plan sponsor; or

(3) An accountant or a member of an accounting firm maintains financial records for the employee benefit plan.

(c) *Effect of certain other services to the plan or plan sponsors.* (1) Subject to paragraph (c)(2) of this section, an accountant will not fail to be recognized as independent solely on the basis that at or during the period of the accountant's professional engagement with the employee benefit plan:

(i) The accountant or the accountant's firm is retained or engaged on a professional basis by the plan sponsor, as that term is defined in section 3(16)(B) of ERISA; or

(ii) An actuary associated with the accountant or accounting firm renders actuarial services to the plan or plan sponsor.

(2) However, to retain recognition of independence, the prohibitions against recognition of independence in paragraph (b)(1), (2), or (3) of this section must not be violated. Further, the rendering of multiple services to a plan by a firm may give rise to circumstances indicating a lack of independence with respect to the employee benefit plan (e.g., result in the accountant or firm providing services that are subject to audit procedures as part of the plan's audit), and, in accordance with paragraph (a) of this section, in determining whether an accountant or accounting firm is not, in fact, independent with respect to a particular plan, the Department will give appropriate consideration to all relevant circumstances, including evidence bearing on all relationships between the accountant or accounting firm and that of the plan sponsor or any affiliate thereof.

(3) Rendering multiple services to a plan by a firm also may involve prohibited transactions under ERISA and requirements to comply with conditions in prohibited transaction exemptions such as prohibited transaction exemption in ERISA section 408(b)(2) for ERISA section 406(a)(1)(C) service provider transactions.

(d) *Definitions.* For purposes of this section:

(1) *Member* means all partners or shareholder employees in the firm and all professional employees participating in the audit or located in an office of the firm participating in a significant portion of the audit; the firm's employee benefit plans; or an entity whose operating, financial, or accounting policies can be controlled by any of the individuals or entities described in this paragraph (d)(1) or by two or more such individuals or entities acting together.

(2) *Office* means a reasonably distinct subgroup within a firm, whether constituted by formal organization or informal practice, in which personnel who make up the subgroup generally serve the same group of clients or work on the same categories of matters regardless of the physical location of the individuals who comprise such subgroup. Substance should govern the office classification, and the expected regular personnel interactions and assigned reporting channels of an individual may well be more important than an individual's physical location.

(3) *Period of professional engagement* means the period beginning when an accountant either signs an initial engagement letter or other agreement to perform the audit or begins to perform any audit, review or attest procedures (including planning the audit of the plan's financial statements), whichever is earlier, and ending with the formal notification, either by the member or client, of the termination of the professional relationship or the issuance of the audit report for which the accountant was engaged, whichever is later. In the case of an auditor that performs a plan's audit for two or more years, in evaluating independence, the Department would not view the period of professional engagement as ending with the issuance of each year's audit report and recommencing with the beginning of the following year's audit engagement.

Signed at Washington, D.C., this 26th day of August, 2022.

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Ali Khawar, Acting Assistant Secretary, Employee Benefits Security Administration,

U.S. Department of Labor.

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